IN THE

reme Court of the United States

OCTOBER TERM, 1951

No. 431

In the Matter of the Application
of
TESSIM ZORACH and ESTA GLUCK,

Appellants.

an order pursuant to Article 78 of the Civil Practice Act

against

G. CLAUSON, JR., MAXIMILIAN MOSS, ANTHONY CAMPAGNA,
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CIS T. SPAULDING, Commissioner of Education of the State
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Appellees,

directing them to discontinue certain school practices

and

EATER NEW YORK COORDINATING COMMITTEE ON RELEASED
TIME OF JEWS, PROTESTANTS AND ROMAN CATHOLICS,

Intervenor-Appellee.

BRIEF FOR APPELLEE COMMISSIONER OF EDUCATION OF THE STATE OF NEW YORK

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The Decisions of the Courts Below

The opinions of the New York Court of Appeals are reported in 303 N. Y. 161.

The opinions of the New York Appellate Division are reported in 278 App. Div. 573.

The opinion of the New York Supreme Court, Kings County, is reported in 198 Misc. 631.

Jurisdiction

Jurisdiction was noted in the instant case on December 11, 1951.

Statement of the Case

The appeal (R. 145) is from a final order and judgment of the Court of Appeals, which affirmed (R. 142) a final order of the Appellate Division of the Supreme Court, Second Judicial Department, which had affirmed (R. 103-105) an order of the Supreme Court, County of Kings, sustaining the objections of appellees in point of law to the petition herein, dismissing the petition on the merits as a matter of law (R. 10); denying petitioners' application in all respects and denying petitioners' motion for an order directing a trial in respect to issues of fact (R. 9-10). The cross motion of the intervenor-respondent for a final order dismissing the proceedings on the merits, on the ground that the petition failed to state facts sufficient to constitute a cause of action, also was granted (R. 9).

By these rulings the New York State courts upheld the constitutionality of the practice in New York State, as authorized by § 3210(1-b) of the New York Education Law and Rules of the State Commissioner of Education and as authorized in New York City by the Rules of The Board of Education of the City of New York, of excusing children from the public schools upon request of their parents to enable them to attend classes in religious instruction or

education, outside of school buildings and grounds and under the auspices of the churches of the parents' choice. The statute and Commissioner's Rules permit the excusing of pupils from school for one hour or less weekly for such purpose. Whether or not the pupil remains in school or is excused is entirely voluntary with the child's parents (Op. of Court of Appeals, 303 N. Y. at p. 168; R. 116).

The Issue as to Appellee Commissioner of Education

The issue as it affects appellee Commissioner of Education of the State of New York is whether the provision of New York Education Law, Section 3210(1-b), which declares that "absence for religious observance and education shall be permitted under rules that the commissioner shall establish" and the rules promulgated by the Commissioner of Education to carry the statutory provision into effect (Regulations of the Commissioner of Education, Article 17, § 154, State of New York Official Compilation of Codes, Rules and Regulations, Vol. 1, p. 683; set forth *infra*) offend the Constitution of the United States.

The petition names two respondents, appellees here, the Board of Education of the City of New York and the Commissioner of Education of the State of New York. The issue is not the same as to both. The allegations of the petition are not all directed against the Commissioner of Education. Some are directed against the Board of Education of the City of New York.

There are more than 3000 school districts in New York State, of which New York City is just one. Conceivably the rules of some district might violate the statute and rules of the Commissioner of Education. Conceivably the actual operation of the program in some district might be in violation of its own rules. Such disobedience might well

"warrant the initiation of disciplinary proceedings against any of the offending teachers or principals" (Op. of Court of Appeals, 303 N. Y. at p. 174; R. 122) or local school authorities. It "would in nowise warrant" (cf. Op. of Court of Appeals, id.) holding the law and rules of the Commissioner unconstitutional.

This brief is on behalf of the Commissioner of Education only, in support of the statute and the Commissioner's rules. Therefore, while we are in accord with the position of the Board of Education of the City of New York upon all issues concerning the Board, our argument will be limited to the issue relating to the Commissioner of Education, as stated *supra*.

The Statute

Section 3210 of the Education Law—which is a part of the Compulsory Attendance Law of the State of New York (Education Law, Article 65, Part I, §§ 3210-3229)—gives legislative approval to a practice which had, prior to the adoption of the law in 1940*, been followed in the State by local school authorities acting under their general discretionary power as to school sessions and attendance *(infra* pp. 6-8).** The law provides in subdivisions 1-a and 1-b as follows:

> "§ 3210. Amount and character of required attendance
>
> 1. Regularity and conduct. a. A minor required by the provisions of part one of this article to attend upon instruction shall attend regularly as prescribed

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* The provision first came into the statute by amendment of former § 625 of the Education Law by Chapter 305 of the Laws of 1940. The section has since been renumbered 3210.

** The practice was held constitutionally valid by the Court of Appeals in 1927, *People ex rel. Lewis* v. *Graves*, 245 N. Y. 195, *infra*, a case involving the practice as adopted in the City of White Plains in 1925.

where he resides or is employed, for the entire time the appropriate public schools or classes are in session and shall be subordinate and orderly while so attending.

b. Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

The Rules of the State Commissioner of Education

The rules of the State Commissioner of Education adopted on July 4, 1940 to implement the statutory provision, and now remaining in full force and effect provide as follows:

"1. Absence of a pupil from school during school hours for religious observance and education to be had outside the school building and grounds will be excused upon the request in writing signed by the parent or guardian of the pupil.

"2. The courses in religious observance and education must be maintained and operated by or under the control of duly constituted religious bodies.

"3. Pupils must be registered for the courses and a copy of the registration filed with the local public school authorities.

"4. Reports of attendance of pupils upon such courses shall be filed with the principal or teacher at the end of each week.

"5. Such absence shall be for not more than one hour each week at the close of a session at a time to be fixed by the local school authorities.

"6. In the event that more than one school for religious observance and education is maintained in any district, the hour for absence for each particular public school in such district shall be the same for all such religious schools." (Regulations of the Commissioner or Education, Art. 17, § 154; State of New York, Official Compilation of Codes, Rules and Regulations, Vol. 1, p. 683)

The Policy and Practice in New York State as to Excusable Absences From School Generally

Always there have been and still are (*infra*, pp. 9-10) many excusable absences from compulsory school attendance in New York State.

In fact, the compulsory education article of the Education Law does not fix the number of hours to constitute a school day. That is left to the local school boards. Only the number of days in a school year, which in a full time day school must be not less than 190 days, is provided (Education Law § 3204[4]).

The Commissioner of Education sets for the local boards of education the general policy as to excusable absences. Discretion has rested, and now rests, with local boards of education to permit absence for other reasons. Excusable absence for religious instruction came within this discretion prior to 1940. Local boards of education adopted the practice of permitting absences therefor on some particular day and hour. The plan in the City of White Plains, New York, which was similar to plans then operating elsewhere in the State, was upheld, as stated *supra*, by the New York Court of Appeals in *People ex rel. Lewis* v. *Graves, supra* 245 N. Y. 195, aff'g 219 App. Div. 233, which had affirmed 127 Misc. 135.

By 1940, the practice of excusing public school children from attendance upon instruction for this purpose and in this manner had become more widespread. To obtain orderliness of practice and the adoption of statewide rules governing such excuses, the Legislature enacted what is now Education Law, Section 3210, subdivision 1-b (L. 1940, c. 305), providing that "Absence for religious observance and education shall be permitted under rules that the commissioner shall establish."

That this statute, here under attack, was merely a legislative recognition of the practice approved in the *Lewis* case *(supra)*, is unequivocally certain from the message of Governor Lehman approving the legislation (1940 Public Papers of Governor Lehman, p. 328):

> "Under this bill the State Commissioner of Education shall establish rules under which children may on certain occasions be permitted to leave school for the purpose of attending their religious observances and receiving religious education.
>
> "For some time it has been the practice in many localities in the State to excuse children from school a certain period each week for religious instruction. The board of regents has recognized the right of local school boards to do this. The Court of Appeals unanimously held that the practice was within the letter and the spirit of our Constitution and laws. In so holding the Court of Appeals pointed out: 'Neither the Constitution or the law discriminates against religion. Denominational religion is merely put in its proper place outside of public aid or support.'
>
> "However, at the present time there is no uniformity of practice throughout the State. Nor is any officer or agency of the State authorized or charged with the responsibility of adopting rules under which absences for religious observance or instruction may be permitted. This bill will assure some uniformity and permanency by placing the authority and responsibility upon the State Commissioner of Education to adopt such rules.
>
> "A few people have given voice to fears that the bill violates principles of our Government. These fears in my opinion are groundless. The bill does not introduce anything new into our public school system nor does it violate the principles of our public educational system."

In accordance with such statutory authority the then Commissioner of Education promulgated the Rules set forth, *supra* p. 5. The organization of the school sys-

tem of the state, the sphere of supervision of the State Department of Education and the sphere of discretion of local school authorities is in general no different today than it was in 1940, and was no different in 1940 than it had been in 1927 when the Court of Appeals held valid in the *Lewis* case (*supra* 245 N. Y. 195) the practice of excusing absence for religious education. And, as we have said, that practice is not altered under the statute and Commissioner's Rules from the manner in which it was conducted prior to 1940 when they were adopted.

Prior to the 1940 enactment of the statutory provision now in Section 3210 of the Education Law, and today—no differently—the Education Law of this State provided and provides for compulsory attendance of all minors of certain ages upon instruction at public school or elsewhere; for some mandatory courses of study; for the minimum number of days schools must remain in session during each year, but not the number of hours per day attendance is required. The hours of attendance were and are determined solely by local school authorities, subject only to the powers of the State Commissioner to insist upon adequate instruction in each school under his supervision.

The compulsory attendance law (Education Law § 3210) does not, as it did not prior to 1940, demand attendance at all times without exception. Local boards of education and other local school authorities are today, as they were prior to 1940, and prior to 1927, authorized and empowered to excuse pupils from attendance upon instruction for any period of time (hours or days) for "legal" or reasonable cause. Today, as then, many matters outside the province of education authorities but of importance to the child or his parent—including religious affairs—are recognized as such "legal" or reasonable causes (*infra*, pp. 9-10; Appen-

The Handling of "Excuses" in New York Schools*

Education Law, Section 3211(1) provides that teachers "shall keep an accurate record of the attendance and absence" of every minor pupil. Such record must show "his attendance, each day, by the year, month, day of the month and day of the week, and hours of the day and the number of hours of attendance in each day thereof."

Pursuant to this section a register is kept by each teacher in which, in accordance with specific directions (see, *Manual for Register Keeping*, Appendix, *infra*, pp. I *et seq.*), is entered "the tardiness or absence of each pupil with symbols to indicate whether such absence is for legal or other than for legal reasons" (Bulletin 1248, University of the State of New York, p. 22). There the teacher records all absences including the particular excusable absence which this petition attacks (id. pp. 22, 29).

All excusable absences are recorded in this one fashion.

The recording of the excusable absence for religious instruction is treated in this usual routine manner.

In support of the answer in the present proceeding, which pleaded that the statute and regulations of the Commissioner of Education do not offend the Constitution, the Commissioner of Education attached an affidavit (R. 53-4) in which he set forth the manner in which the Department of Education, in exercising its duty of general supervision of the compulsory attendance provisions of the Education Law, provides for the recognition of *bona fide* excuses from school attendance: — the department

> "has prepared and distributed bulletins containing digests of the applicable statutory provisions, regula-

* This subject is further discussed in point I *infra*.

tions promulgated thereunder, rules of procedure and forms for the information, assistance and guidance of local school authorities in such matters; that in the matter of the recognition of *bona fide* excuses which may be accepted as proper, warranting absence from attendance upon instruction in all schools, the Department has advised local school authorities that the following are among those that may be so accepted (Bulletin No. 1248, University of the State of New York, July 1, 1943, pp. 30-32):

> Sickness of the pupil
> Sickness or death in the family
> Impassable roads or weather making travel unsafe
> Religious observance
> Quarantine
> Required to be in court
> Religious instruction or education
> (Regulation of Commissioner of Education, § 154)
> Approved instruction in music"

The affidavit further stated that granting of individual excuses (R. 55) and the conduct of released time programs "in accordance with the requirements" of the regulations of the Commissioner of Education are solely within the province of the local school authorities. Attached as exhibits (R. 56-63) to the affidavit are letters selected at random from local school authorities throughout the State, containing descriptive summaries of released time practices in various localities, as representative of those generally prevailing throughout the State.

The Holding of the New York Court of Appeals

The opinion of the Court was by Judge Froessel, concurred in by Judges Lewis, Conway and Dye. Chief Judge Loughran concurred in the decision upon the authority of *People ex rel. Lewis* v. *Graves*, *supra*, 245 N. Y. 195. Judge Desmond concurred in a separate opinion. Judge Fuld dissented in an opinion.

The majority opinion held that the New York program in nowise violated the Constitution; that it neither constituted a prohibited establishment of religion nor offended the guarantee of freedom of religion; that there is no use of tax-supported property or credit or public money directly or indirectly in aid or maintenance of religious instruction (303 N. Y. at pp. 168, 169; R. 116, 117).

The Court enumerated the features of the Champaign plan (before this Court in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203), which it held "differed radically" from the New York practice, viz.: "There was no underlying State enabling act. Religious training took place in the school buildings and on school property. The place for instruction was designated by the school authorities. Pupils taking religious instruction were segregated by school authorities according to faiths. School officials supervised and approved the religious teachers. Pupils were solicited in school buildings for religious instruction. Registration cards were distributed by the school, and in one case printed by the school" (303 N. Y. at p. 168; R. 116).

"None of these factors," said Judge Froessel, "is present" in the New York program (id.).

Pointing out that Mr. Justice Black, writing for this Court in the *McCollum* case, had stated that the "foregoing facts"* "show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting

* That is, the characteristics of the program as practiced, there being no statute in Illinois prescribing what the program must be as there is in New York. In New York the "facts" of the program, its elements, are the statute and rules of the Commissioner of Education. It is to these alone that the constitutional test is to be applied.

religious education," the Court held—construing the New York statute and the Commissioner's rules—that, on the contrary, in New York there was no such use of tax-supported property or cooperation in promoting religious education (303 N. Y. at p. 169; R. 117).

Again construing the statute and rules, the Court held the present program in New York substantially the same as the one held constitutionally valid in *People ex rel. Lewis* v. *Graves, supra,* except for the presence now of the State enabling act (303 N. Y. at p. 170; R. 118).

For the very reason that "the public school must be kept separate and apart from the church" and therefore that "pupils may not constitutionally receive religious instruction therein," the Court held that the New York program is valid because "all that New York parents ask then is that their children may be excused one hour a week for that purpose" (303 N. Y. at p. 173; R. 121).

Prior to the instant proceeding, the same Lewis who had been the plaintiff in *People ex rel. Lewis* v. *Graves, supra,* 245 N. Y. 195, brought a proceeding in 1948 to have the present program, under the statute and rules of the Commissioner of Education, held unconstitutional. The New York Supreme Court, Mr. Justice Elsworth, upheld the law (193 N. Y. Misc. 66) and dismissed the petition. Appeal from this decision was taken directly to the Court of Appeals. On the day of the argument and after the filing of briefs, the appeal was discontinued by the appellant in open court (299 N. Y. 564). Mr. Justice Elsworth, too, had pointed out, construing the New York statute, that unlike the Champaign plan held unconstitutional in the *McCollum* case, the New York program "entails no use of the school

buildings for the religious instruction, nor is there any expenditure of public funds for that purpose" (193 Misc. at p. 73).

Summary of Argument

I—The statute, and the rules of the Commissioner of Education promulgated thereunder, do not violate any provision of the Constitution.

If the schools, in their connection with the program, render some incidental benefit to religion, this Court has held far more direct and tangible assistance to be constitutionally unexceptionable.

II—As to appellee Commissioner of Education, there is certainly no issue of fact to be tried before the constitutionality of the State statute and Commissioner's rules can be determined.

This appeal having been scheduled for oral argument on January 30, the time element has necessitated the completion of this brief before receipt of appellants' brief, and therefore without knowledge of the course which appellants' arguments may take in this Court.

I

The statute, and the rules of the Commissioner of Education promulgated thereunder, do not violate any provision of the Constitution.

If the schools, in their connection with the program, render some incidental benefit to religion, this Court has held far more direct and tangible assistance to be constitutionally unexceptionable.

By Section 3210(1-b) of the Education Law, New York State permits children to be excused from school (1) for religious observance and (2) for religious education, under rules that the Commissioner of Education shall establish. The statute does not differentiate in any way between excuse for religious observance and excuse for religious education.

This is the statute that is before the Court at this time. The only program that is authorized in New York State is pursuant to the provisions of this statute. The determination of this case, therefore, it is respectfully submitted, must be whether this statute directs or authorizes any practice which offends the Constitution of the United States.

The statute is, as it declares in so many words, an enactment permitting *absence from* school for the purposes stated.

Pursuant to it, pupils may be excused to permit them to observe religious holy days. This is in accord with an "immemorial and unchallenged practice" (Dissenting Op. Court of Appeals, 303 N. Y. at pp. 191-2; R. 140). To refuse to excuse children for religious observance would, as that opinion went on to say, "be a restraint of that freedom of religion, an interference with that liberty of worship,

which the Constitution guarantees. (Cf. *West Virginia State Bd. of Educ.* v. *Barnette*, 319 U. S. 624, *passim.*)" (See also Op. of the Court, 303 N. Y. at p. 173; R. 121).

Since that is undeniably so, it is not seen how a contention can be sustained that the same statute permitting in the same words excuses for absence for religious "education" is unconstitutional. Both absences are obviously from school attendance during hours in which there are school sessions. Otherwise there would be no reason for or purpose in the law.

All of the arguments appellants have made to excusable absence for religious education would, if they had merit, apply with greater force to excusable absence on religious holy days. If the former is benefit to religion, so is the latter. If the former is divisive so is the latter. In fact more so. For in order to attend weekday religious classes all children of all faiths are excusable at the same time. Holy days of various religious faiths, on the other hand, fall at different times and the children of a particular faith only are absent on a particular day. If there is no constitutional objection to the permission that the statute authorizes for excusable absence during regular school sessions for religious observance on holy days, it is difficult to see how the same statute becomes invalid when under it pupils are excused once weekly for religious education—also outside the school buildings.

As directed by the statute, the Commissioner of Education has promulgated the rules set forth, *supra* (and in the Court of Appeals opinion, 303 N. Y. at pp. 166-7; R. 114-115). These rules prescribe that the instruction, for which the absence may be requested by a parent or guardian, is to be had "outside the school buildings and grounds"; that a copy of the pupil's registration for the religious

classes must be filed with the school authorities and that report of his weekly attendance must be filed with his principal or teacher; that only one hour's absence a week for this purpose may be excused; and that such hour each week must be at the close of a school session at a time fixed by the local school authorities in the district or municipality. Wherein is there any intrusion of religion or religious instruction upon school premises or into school curriculum by the provisions of the statute or the rules of the Commissioner of Education?

If appellants in this Court take the same position that they did in the state courts, their argument will be chiefly against released time generally as a concept, as being in conflict with separation of church and state, rather than specifically against the New York statute. This Court, however, will not rule upon the constitutionality of a concept. As Mr. Justice Frankfurter said in the *McCollum* case (333 U. S. at p. 225), "Of course, 'released time' as a generalized conception, undefined by differentiating particularities, is not an issue for Constitutional adjudication. * * * It is only when challenge is made to the share that the public schools have in the execution of a particular 'released time' program that close judicial scrutiny is demanded of the exact relation between the religious instruction and the public educational system in the specific situation before the Court".

The question before this Court in the instant case is then: Do the statute and the rules of the Commissioner establish such a relation between the public educational system and religious instruction as to violate the First Amendment to the Constitution? We submit that they do not; that appellants have not shown and cannot show that they do.

Appellants in support of their broad and general attack have, in the state courts, cited one reason or another that

various groups give for disapproving released time programs—not necessarily the New York program. These, however, are declarations of some people's point of view as to the desirability of excusing children from school for religious education. But whether a State statute is "conducive to good or evil for the people" of the State (Mr. Justice Black in *Watson* v. *Buck*, 313 U. S. 387 at p. 403; and at p. 447, *Autry* v. *Alabama*, 308 U. S. 444), whether it is desirable or not (*Daniel* v. *Family Ins. Co.*, 336 U. S. 220 at p. 225) are questions which this Court habitually leaves to the state legislature. The citizens of New York as represented in the State Legislature of New York were of the opinion that children should be excused for this purpose if their parents wished it. They thought so by a vote of 46 to 1 in the New York State Senate, and a vote of 132 to 7 in the Assembly.

The primary tangible argument appellants have made is that some opponents of released time programs contend that it imposes a heavy administrative burden on the school system. The answer to that is that in New York State the "burden" is merely the recording of the excuse as part of the routine keeping of the child's attendance record. The amount of administrative time devoted to it is minuscule when the teacher is keeping an attendance register for the class for some 190 days of the school year, recording the presence of each child for the entire school day, presence for a single session, tardiness for one or both sessions, absence for some dozen common "legal", that is, validly excusable absences, and absences classified as "illegal." The slight chore for the teacher in recording, as part of this duty of keeping each child's attendance record, the excusable absence once a week for outside religious education is, it is readily apparent, incapable of measurement as to the

time spent in making the record. Certainly the time so spent is so infinitesimal that it could not be calculated in cost to the school system.

As a matter of fact, all that the teacher has to do in New York State is to note a symbol. In New York State each teacher has a Register of Attendance supplied by the State Department of Education. In it the teacher enrolls the names of all pupils. There are pages with boxes for each day of the school year. In such boxes the teacher must record the pupil's presence or absence for the day (recording any absence for part of the day) in symbols, pursuant to direction contained in the *Manual For Register Keeping* which the State Department issues. In the Appendix to this brief we have reproduced excerpts from this manual.

Such is the extent to which the teacher's time and the public money is expended under the New York program for excusable absence to attend the religious classes. The teacher jots down a symbol next to the name of the pupil who is absent for the last hour in the afternoon of one day a week in order to attend religious classes away from the school, as the teacher notes a symbol when the pupil is tardy or absent all or any part of the day for any of the dozen or more recognized excuses.

The recording of the absence for attendance at religious education is not to lend aid to the religious class, but as part of keeping the attendance record. The importance of the attendance record looms so large in the operation of the school system that the elaborate and minute instructions for their keeping, already referred to (and see Appendix), are issued by the Department of Education to local school authorities. A child may not be recorded as present unless physically present. He may not be recorded as present

even if he is absent because taken under school auspices to a museum or on other supervised educational expeditions; he is recorded as absent with a designated symbol, "Ed" (see Appendix). The Department's Bulletin on compulsory attendance (*supra*, op. cit. No. 1248) warns (p. 22) "the register record must show just what happened in connection with the attendance of each child." Therefore, the school must, in connection with the absence of a child excused for religious education, satisfy itself "that the excuses are not taken advantage of and the school deceived, which is, of course, the same procedure the school would take in respect of absence for any other reason" (Op. of Court of Appeals, 303 N. Y. at p. 169, R. 117). In the case of any excusable absence, the child must bring a written statement from the parent (op. cit. Bulletin No. 1248, p. 29) of the reason for the absence, frequently required to be supported by a statement from the doctor. Accordingly, the Commissioner's rules require that pupils must file a copy of their registration at the religious class with the school and report of their actual presence at the class each week.

Appellants will probably contend in this Court, as they did in the state courts, that there is represented in the acceptance and recording of the excuse a relation between the school and religion which there should not be. If it can be conceived to be a contact between the school and religion to accept an excuse for absence to attend religious classes in common with the excuses for attendance at music or the dentist or appearance in court or at a clinic, it is assuredly a modicum of assistance to religion in comparison to assistance or participation held constitutionally proper (cases *infra*).

Appellants have also in the State courts referred to the "momentum" of the compulsory attendance system put behind religious instruction; they urged a child's inclination to join in leaving school for the hour if his fellows do likewise. Perhaps there was a tendency in this direction when in Champaign, Illinois, the religious teachers came into the schools, but it has been shown on behalf of appellants that a relatively small percentage of children participate in the program in New York City, for example. In the Court of Appeals an organization filing *amicus curiae* in behalf of appellants' position presented a study* (Public Education Association, *Released Time For Religious Education in New York City Schools*) it had made which indicated that there was a far larger proportion of the student body who did not avail itself of the excuse privilege than who did, and that participation in the program was tending to decrease. So that apparently the "momentum" of the compulsory attendance system is proving to be a fairly weak force behind the program.

Again, if going to a class in religious education outside of school is more attractive than a class in school, or if the fact that the boy or girl at the next desk goes proves a lure to his neighbor, it requires a great deal of ratiocination to establish even a tenuous relation between the compulsory attendance system and the child's desire or willingness to attend religious classes outside the school. If a preference for a religious class over the schoolroom or the desire of the child to do what his schoolmate does, in some intangible degree are encouragement to children to attend religious classes, that constitutes but remote benefit to

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* Demonstrating the complete disassociation of the public school system from weekday religious education is the fact that the Department of Education has never compiled any statistics of absences excused for religious education.

religion, far less significant than benefits held by this Court to be constitutionally proper as being incidental or minor.

The conspicuous decisions of this Court to this effect are *Everson* v. *Board of Education*, 330 U. S. 1, and *Cochran* v. *Louisiana State Board of Education*, 281 U. S. 370.

In the *Everson* case this Court held it not to be a violation of the First Amendment for the State of New Jersey to authorize the use by a municipality of public money to transport children by bus to church schools. This was upheld against the argument that the State was thereby imposing taxes in support of a religion, thus violating the constitutional prohibition against establishment of religion (pp. 7-8). The reasons that compelled the Court to hold the New Jersey statute not unconstitutional are apposite here. Mr. Justice Black there said that while New Jersey could not consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches "the tenets and faiths of any church," "on the other hand, other language of the amendment commands that New Jersey cannot hamper its citizens in the free exercise of their own religion"* (p. 16). Mr. Justice Black went on to say that "It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children's bus fares out of their own pockets when transportation to a public school would have been paid for by the State" (p. 17). Mr. Justice Black recalled (at pp. 9-11) that the genesis of the First Amendment was the protest of the peo-

* Thus the exercise of religion includes freedom to give children a religious education.

ple of the day against the requirement of some colonies that everyone support government sponsored churches and that the purpose in adopting it was to provide protection against "governmental intrusion on religious liberty" (p. 13). Mr. Justice Black then cautioned that "we must not strike" a state statute down "if it is within the State's constitutional power even though it approaches the verge of that power" (p. 16). Pointing out that if numerous public services were cut off, which church schools generally receive, it would make it more difficult for parents to send their children to such schools or cause them to be reluctant to do so, Mr. Justice Black concluded: "But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and non-believers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them" (p. 18).

The statute and rules of the Commissioner of Education here before the Court rigorously forbid any intrusion of religion on public school property or in the public school curriculum. On the contrary, it would be a violation of the freedom of religion guaranteed by the First Amendment to deny the people's desire, as manifested in the statute, to exercise their religious liberty to obtain the excusing of their children from school for religious attendance, for one hour of the 25 hours a week children commonly spend in school. Even if the people through the Legislature have adopted a statute which "approaches the verge" of the limit of permissible contact between the school and religion, it has not gone over the verge, and the courts may not therefore strike this statute down.

If thoughtful and responsible persons deem this practice undesirable, it is for them to win popular support to their view so that parents will not request that their children be excused for this reason.

A statute which manifestly comes much closer "to the verge" than the New York excusable absence program, is that upheld unanimously by this Court in *Cochran v. Board of Education*, 281 U. S. 370. There the Louisiana statute provided for the purchase with public moneys of books to be supplied free of cost to all school children of the State, including those attending church schools.

Again, in *Bradfield* v. *Roberts*, 175 U. S. 291, this Court upheld the appropriation of money by Congress for the construction of hospital buildings operated by the Roman Catholic Church.

The First Amendment is not regarded in popular understanding or by judicial construction as outlawing every recognition of religion which carries with it from state to church some resultant benefit.* In some instances the resultant benefit is substantial, as in the tax exemption of church property. Of some benefit to religion must be (else the ceremony is meaningless) the opening of sessions of Congress, state legislatures and many public functions with a prayer by a clergyman, and the taking of an oath with a hand on the Bible by witnesses in all courts. The service of chaplains in the armed forces, and many more accepted and unquestioned practices will immediately occur to the Court which involve a very direct connection between church and state. This Court at its last term (April 16, 1951) dismissed "for the want of a substantial federal question" an appeal in *Friedman, et al. v. New York*, 341 U. S. 907, a case where the Court of Appeals of New York

* Virtually all such recognition entails the use of some public money.

(302 N. Y. 75) had upheld a Sunday law notwithstanding the argument that separation of church and state compelled the invalidation of the law.

The separation of church and state does not forbid these recognitions of religion by the State. Instead, the constitutional guarantee of religious liberty calls for them. Parents asking that they may obtain the excuse of their children one hour a week from school for the purpose of attending classes in religious education outside the school, are, too, asking but to be permitted the free exercise of the constitutional guarantee of freedom of religion. No constitutional guarantee receives greater protection by this Court than that of the right freely to follow and practice one's religious faith, for truly this country was founded in the search for that freedom. And to hinder it is repugnant to our ultimate and most treasured constitutional guarantee.

This Court has sheltered the right to religious freedom, even when the manner in which it was exercised must have impressed it as reprehensible (*Kunz* v. *New York*, 340 U. S. 290). The decision in the *Kunz* case was another in a continuity of decisions and declarations to the effect that the First Amendment "has a dual aspect," and not only "forestalls the compulsion by law" of the acceptance and practice of any form of religious faith but safeguards the right to the free exercise of the faith of one's choosing (*United States* v. *Ballard*, 322 U. S. 78; *Marsh* v. *Alabama*, 326 U. S. 501; *Follett* v. *McCormick*, 321 U. S. 573; *Murdock* v. *Pennsylvania*, 319 U. S. 105).

This Court has been particularly assiduous in leaving to parents the freedom to rear and educate their children in their own religious faith (*Pierce* v. *Society of Sisters*, 268 U. S. 510, and see *Prince* v. *Massachusetts*, 321 U. S. 158).

In *West Virginia Board of Education* v. *Barnette*, 319 U. S. 624, the successful attack upon a mandatory requirement, that children in the public schools salute the flag and pledge allegiance, was made by members of Jehovah's Witnesses who contended that this violated their religious beliefs which include literal observance of the Second Commandment. Children had been expelled from school for refusal to participate in the ceremony, had been regarded as unlawfully absent and their parents as subject to prosecution.

Mr. Justice Jackson in that case carefully noted (p. 630) that the refusal of these children to participate in the ceremony "does not interfere with or deny rights of others to do so." The ceremony was not ordered discontinued by this Court; merely that the compulsion upon children to participate be ended. The children were thus permitted the right to distinguish themselves from their classmates in the exercise of their religious liberty.

That is what the children who choose to leave school to attend religious education classes ask to be permitted to do. They "do not interfere with or deny rights of others" to refrain from availing themselves of the excuse privilege. Appellants, as we have observed, *supra*, have cited statistics which show that it is the smaller percentage of children who leave to attend religious classes. The greater part of the student body does not. To deny the number who desire to go, or whose parents desire that they go, the right to do so is to interfere with their free exercise of religious liberty.

The New York Statute and Rules of the Commissioner Authorize Practice that is Fundamentally Distinguishable from the Champaign Plan Held Invalid in the *McCollum* Case.

Appellants will undoubtedly argue in this Court, as they did in the State courts, that their case comes within the decision of this Court in *Illinois ex rel. McCollum* v. *Board of Education*, 333 U. S. 203. The present proceeding and before that the proceeding in *Matter of Lewis* v. *Spaulding*, (193 Misc. 66; 299 N. Y. 564) were occasioned, as appellants have declared, by that decision. Until then, no one after the adoption of Section 3210(1-b) in 1940 deemed that it authorized anything differing from the program held constitutionally valid in *People ex rel. Lewis* v. *Graves, supra*, 245 N. Y. 195, and no attack had been made upon the law. Not only were appellants moved, by the *McCollum* decision, to bring the instant proceeding, but they have argued in the State courts, as they may here, that this Court, aware of the existence of the New York law through the medium of an *amicus curiae* brief filed in the *McCollum* case (by one of the attorneys for intervenor-appellee in the present case), intended some of the language in the opinions in that case to be rulings upon the constitutionality of the New York law.

This Court does not need us to say for it that it decides only the case at bar and judges the constitutionality of no statute but one in litigation before it.

Contrary to statements appellants have made in briefs and oral argument in the State courts, the several opinions in the *McCollum* case very explicitly confine that decision to the practice in Champaign, Illinois, which was then before the Court, and in so many words declare that programs which do not go "beyond permissible limits" (333

U. S. at p. 237, also at p. 225), as the program in Champaign, Illinois did, might well be found constitutionally altogether proper.

The issue argued in the *McCollum* case, the issue there decided, was the constitutional propriety of having religious instruction in the public school buildings, of bringing religious teachers into the public school rooms. The basis and essence of the decision was "the use of tax-supported property for religious instruction" (333 U. S. at p. 209). "Use of tax-supported property" under the Champaign plan meant the physical use of the school structures, and it meant more. It meant sectarian-religious instruction in the public schools. In fact, the sole prayer for relief in the *McCollum* petition was that the defendant Board of Education prohibit

> "all instruction in and teaching of religious education *in* all public schools in Champaign School District Number 71, Champaign County, Illinois, and *in* all public school houses and buildings in said district when occupied by public schools." (Record in Supreme Court of the United States, p. 17; quoted in part in the opinion at p. 205; emphasis supplied)

Not this fundamental feature of bringing sectarian religious instruction into the public schools nor any of the details thereof and stemming therefrom, which constituted the "close cooperation" of the school authorities in promoting religious education (333 U. S. at page 209), can be found in the provisions of Education Law, Section 3210(1-b) or the rules of the Commissioner of Education promulgated thereunder. The "radical" distinction (Op. of Court of Appeals, 303 N. Y. at p. 168; R. 168) of the New York program rests in the "radical" difference between the base of the Champaign plan and the base of the New York statute and the Commissioner's rules:—In Cham-

paign, sectarian religious classes were conducted in the regular classrooms of public school buildings by sectarian religious ecclesiastics. In New York, the statue and rules permit children to be *absent from* school for religious education "to be had outside the school building and grounds."

II

As to appellee Commissioner of Education, there is certainly no issue of fact to be tried before the constitutionality of the State statute and Commissioner's rules can be determined.

We anticipate that appellants will argue that though the New York statute and rules be valid, this Court should not affirm the holding of the Court of Appeals, but should send the case back for trial. Appellants will probably contend, as they did in the State courts, that they are prepared to show operation of the program in New York City in a manner that is constitutionally objectionable. The answer is that if that be so, such operation constitutes a violation of the statute and rules; it does not condemn the statute and rules.

In their brief in the Court of Appeals appellants declared that it is "true" that the statute and rules could be unimpeachable constitutionally as written, and yet the operation be "invalid."

While they would like to draw the inference, as they tried in the State courts, that any abuse, if it appears, is inherent in the excusable absence statute, it is altogether clear that such an inference does not only not follow but is forbidden by every word and injunction of the statute and rules.

There are, as we have stated at the outset of this brief, more than 3000 school districts in New York State, and what one or even several school teachers may do in one of those 3000 districts, in defiance of the language and plain spirit and intent of the State statute and State rules, cannot make such constitutionally valid statute and rules invalid.

The State courts held, as to this contention by appellants, first, that the allegations which appellants claim to be of facts were largely "conclusory in character", and improperly pleaded (Op. 303 N. Y. at p. 174; R. 122). In response to appellants' claim of the relevancy of such allegations to the constitutional question, the Court of Appeals said citing decisions of this Court (303 N. Y. at pp. 174-5; R. 122-123):

> "Moreover, many of the conclusory allegations suggest merely a disobedience of the rules and regulations. Such disobedience, while it might warrant the initiation of disciplinary proceedings against any of the offending teachers or principals, would in nowise warrant the relief prayed for, namely, a total discontinuance of the released time program and a rescission of all regulations established by the authorities. It is, of course, possible that a statute and regulations constitutional on their face may be administered in an unconstitutional way (*Snowden* v. *Hughes*, 321 U. S. 1; *Yick Wo* v. *Hopkins*, 118 U. S. 356), but in order to invoke this principle it must appear that there is 'an element of intentional or purposeful discrimination' by the enforcement authorities (*Snowden* v. *Hughes*, *supra*, p. 8). Here there is no allegation in the petition to that effect, and, indeed, even in appellants' brief and in the briefs *amici* supporting their position, 'The offer of proof was not an offer to show a pattern of discrimination consciously practiced' (*People* v. *Friedman*, *supra*, p. 81). Under the circumstances, whether the released time program is constitutional is

> solely a question of law, and the case has been so treated by Special Term as well as by the Appellate Division majority and dissenters."

As the Court of Appeals pointed out, if the statute and rules are valid, as we think we have demonstrated them to be, any infraction of them, while perhaps calling for disciplinary action, would be without relevancy on the question of their validity.

Conclusion

To decide in appellants' favor, it must be held that the Constitution of the United States requires this Court to tell the State Legislature, as well as the schools, that the schools may not recognize the parent's request for the excuse of a child from school when the reason for the request is that the parent desires the child to attend religious classes outside the school, although they must honor such a request when it is to permit the child to go to the dentist or for music lessons during school time.

Such a decision and command would be indeed denial of the freedom of religion guaranteed by the Constitution. The guarantee is the freedom of the adult to enjoyment of religious profession and worship in his home or in his church, and to give religious education to his children in his home or his church.

Whether other people approve of a parent's judgment in asking that his children be excused once weekly from school to receive such religious education outside the school has no bearing upon the constitutionality of the law. The decision by the courts is to be made by measuring the law against the First Amendment, in its "dual aspects," what it prohibits—and what it protects.

We have shown in this brief that the law here and the Commissioner's rules do not demand nor do they permit anything which the Constitution prohibits.

On the contrary, to deny to parents their request that children be excused to attend religious education outside the school, while the school permits excuses for a variety of other activities (which could also be taken care of after school hours), would be to act "so as to handicap religions" and "to be their adversary." This the Constitution does not require the State to do or to be *(Everson* v. *Board of Education, supra,* 330 U. S. at p. 18).

The order and judgment of the Court of Appeals of New York should be affirmed.

January 20, 1952.

Respectfully submitted,

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APPENDIX

From *Manual For Regist · Keeping*, University of the State of New York. Pages 9-13.

(Directions to teachers on keeping attendance records of pupils; appearing also in more summarized form on the inside cover and in forepart of the Register of Attendance supplied by the University of the State of New York, the State Education Department, in which each teacher must keep the attendance record of every pupil.)

METHODS OF ACCOUNTING

Absence

A. M. .....

P. M. .....

A. M. & P. M. .....

Tardiness (less than 30 minutes)

A. M. .....

P. M. .....

A. M. & P. M. .....

Tardiness (over 30 minutes)

Figure 1 shows loss up to one hour .....

Figure 2 shows loss over one hour .....

SYMBOLS FOR ILLEGAL ABSENCE

Unlawful detention .... O Truancy .... —

Truancy. A child sent to school, whose parents expect him to be in school, who does not attend for other than lawful reasons is a truant.

Unlawful detention. When a pupil is absent from school with the knowledge and consent, stated or implied, of his parent for other than legal reasons, it is a case of unlawful detention. Such excuses as the following come under this head: "visiting," "away," "went hunting," "vacation," "went to city," "shopping," "work," "needed at home," "helping at home," "caring for baby," "digging potatoes," "picking apples," "garden work," "no shoes," "no rubbers," "no clothes," "overslept," etc.

Excused Absence for Part of a Session

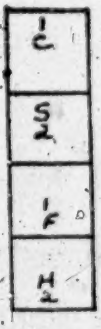
The figure 1 indicates absence up to one hour and the figure 2 up to two hours.

A. M. Beginning of session .....

A. M. End of session .....

P. M. Beginning of session .....

P. M. End of session .....



Use proper symbol to show cause of absence for part of a session and proper figure to indicate length of absence.

SYMBOLS FOR LEGAL ABSENCES

Sickness[1]	S	Required to be in court (may be used to indicate absence due to driver test or interview before draft board)	Co
Sickness or death in family	F	Music lesson	M
Impassable roads or weather, making travel unsafe	R	Attendance at organized clinics	Cl
Religious observance ..	C	School supervised curricular projects[2]	Ed
Quarantine	Q	Cooperative work program	W
Remedial health treatment	H		

[1] Schools may use code numbers to indicate sickness. These are shown on Form O, Analysis of "Absence Known to Be Due to Illness." Copies may be obtained from the superintendent of schools or the Bureau of Guidance, State Education Department. When code numbers are used the symbol "S" may be omitted in the register for that day. This system of recording is optional and should be used only at the direction of the superintendent of schools.

[2] The instruction of pupils on supervised curricular projects [*e. g.* trips to museums] away from their regularly assigned places in the school should be indicated in the register as absence from the school and explained by the use of the symbol "Ed." This symbol should be used when a part of *or* the whole school day is involved.

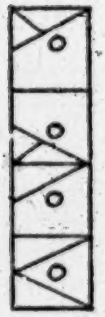
Unlawful detention

Tardy A. M. .....

Tardy P. M. .....

Absent A. M. .....

Absent A. M. & P. M. .....



Truancy

Tardy A. M. .....

Tardy P. M. .....

Absent P. M. .....

Absent A. M. & P. M. .....

USE OF SYMBOLS
(Examples)

Absence

A. M. Sickness .....

A. M. and P. M. Sickness .....

A. M. Attendance at organized clinic .....

P. M. Required to be in court .....

A. M. and P. M. Religious observance .....

A. M. and P. M. Quarantine .....

A. M. and P. M. Supervised educational project ..

A. M. and P. M. Impassable roads or weather ...

Last hour in A. M. Sickness .....

First hour in A. M. Remedial health treatment ...

Last two hours in P. M. Illness in family .....

A. M. and up to one hour in P. M. Supervised educational project .....

Remedial health treatment .....
* note time in margin 9:30—10:30 in A. M.

Last hour in P. M. Supervised educational project .....

Last hour in P. M. Religious instruction .....

Last hour in A. M. Music .....

Last hour in P. M. Cooperative work program .....

Last hour in P. M. Unlawful detention .....

Truancy—skipped period and left building .....
* enter time in margin 2:00—2:45 P. M.

Tardiness

Under 30 minutes Church attendance .....

Over 30 minutes but up to one hour Sickness in family .....

Over one hour Truancy .....

Under 30 minutes Unlawful detention .....

* NOTE: This is the direction for recording the absence for attendance at religious instruction pursuant to the statute and Commissioner's rules attacked in this proceeding.